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ABSTRACT

The views of the Ad Hoc Committee of Educational Institutions and Organizations on Copyright Law Revision on the major problems of copyright law revision, particularly in relation to emerging instructional technology, are outlined at length in this paper. Among areas discussed are developments leading to the establishment of the Ad Hoc Committee, what education wants from the copyright law, limited copying and recording for educational use, reasonable use of new educational technologies, the needs of education as affected by copyright duration, and basic principles of public policy. (SP)

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MAJOR PROBLEMS OF COPYRIGHT LAW

AS VIEWED BY

THE AD HOC COMMITTEE ON COPYRIGHT LAW REVISION

By

Harry N. Rosenfield, Esq.*

SECTION 1 -- The Ad Hoc Committee

The Ad Hoc Committee (of Educational Institutions and Organizations) on Copyright Law Revision [hereinafter referred to as "The Ad Hoc Committee"] is composed of 35 constituent organizational members, all of which have highly respected leadership roles. The Ad Hoc Committee's constituents cover the entire spectrum of education. It is one of the most widely representative educational groups in America today. As its Chairman, Dr. Harold E. Wigren, stated before a Senate Subcommittee:

> "It is not often that educational groups appear with such a united front before committees of the Congress. It is not often that all these groups with such diverse interests sit on the same side of the table in presenting education's needs and consensus . . .. This is one of the most amazing examples of ecumenical spirit in educational history."[1]

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Note: This paper is designed to outline the views of the Ad Hoc Committee [of Educational Institutions and Organizations] on Copyright Law Revision on the major problems of copyright law revision, particularly in relation to emerging instructional technology.

The views herein expressed are the author's and are not an official expression of the Ad Hoc Committee, although obviously the author has sought to provide an accurate expression of the current views of the Ad Hoc Committee.

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The 35 organizations which are members of the Ad Hoc Committee are listed in Exhibit 1.

I. Developments Leading to Establishment of the Ad Hoc Committee

A. The present copyright law was enacted in 1909. Over the years there have been many efforts to update this law. The most recent started in 1955 when Congress initiated a program looking toward copyright law revision. This program started with the preparation (under the Copyright Office's aegis) of 35 studies on the principal issues in copyright revision. In 1961 the Register issued a Report with recommendations. Then followed a series of meetings with a Panel of Consultants looking to development of a draft bill. By 1962-63 this process was coming to fruition and a draft revision bill was emerging.

B. In March of 1962 the National Education Association called a national conference dealing with the professional, legal and ethical problems arising for teachers in connection with the expanded use of new technological developments in education. One of the four major areas designated by that Conference for further exploration in depth was the following:

> "Copyright problems relating to the use, recording, and re-use of materials in the

> classroom and on television (printed materials, graphics, and filmed or televised materials)."

C. On June 11, 1963 the National Education Association held a staff meeting attended by 18 staff members and a private attorney who had been requested to study the copyright matter and to pinpoint the areas of possible interest to education. On June 12, 1963 NEA's Executive Secretary wrote to the Register of Copyrights as follows, in part:

> "We believe that the public interest requires that there be a maximum of adaptability of materials for educational use, and that any new copyright policy which might be formulated, enacted and administered should protect and preserve the public interest in sound and effective education."

Dr. Carr's letter also advised the Register that NEA was conferring with other organizations.

D. On July 23, 1963 the National Education Association called an exploratory Conference on Copyright Law Revision, under the joint sponsorship of NEA's Division of Audiovisual Instructional Service and NEA's National Commission on Professional Rights and Responsibilities. The invitation from Dr. Harold E. Wigren, NEA's Educational Television Consultant, read in part:

> "At this meeting, we would like to apprise you of some of the developments with respect to revision of the copyright law and discuss with you some implications these may have for educational institutions or organizations. We are calling this meeting so that we may share with you a tentative position which the NEA plans to take in these proceedings [the Panel sessions of the Register of Copyrights] and to obtain your thinking thereon."

Fifty-two individuals representing 47 national educational organizations attended this meeting.

E. Upon motion of the representatives of the College English Association, seconded by the representative of the National Catholic Educational Association and the National Catholic Welfare Council, the Conference adopted the following resolution:

> "RESOLVED that the participants in this conference express their vital concern in the proposed revision of the Copyright Law, especially as it affects education both as a producer and consumer of copyrighted material;
>
> and support the efforts of the NEA in seeking clarification of fair use by educational users of copyrighted materials."

F. The representative of the American Council on Education suggested establishment of an ad hoc committee of various organizations in order to present a unified position for education before the Register of Copyrights in his meetings with his Panel and in his draft of a proposed revision of the copyright law.

G. As a result of this Conference, Dr. Wigren took two actions:

1. On July 24, 1963, he wrote to the Register advising him of the Conference and its resolution of concern over copyright law revision; and

2. On August 12, 1963, he called the first meeting of an ad hoc committee for September 5, 1963.

II. The Ad Hoc Committee

A. The first meeting of the Ad Hoc Committee took place on September 5, 1963 in Washington. The letter of invitation, addressed by NEA to representatives of national educational organizations, called for a "working group" to spend the whole day as follows:

> "Our main purpose will be to examine in detail the law, and the proposed revision of the law, so that we can determine their implications for education. This would seem advisable before we come up with a 'position' . . . . The ad hoc committee will be strictly advisory, and it is our hope that we might be able to arrive at a unified position for education in dealing with these matters."

B. At this meeting, Dr. Harold E. Wigren was elected Chairman of the Ad Hoc Committee, a position he has held continuously since then.

C. Thus began the Ad Hoc Committee. It is not an NEA committee, but a multi-member committee of which NEA is a member.

D. Since that first meeting on September 5, 1963, there have been more than 30 plenary meetings of the Ad Hoc Committee as a whole. Generally they have met at the NEA headquarters in Washington, but other meetings have taken place at the Washington headquarters of the American Council on Education, and in New York City.

Meetings were conducted on the basis of advance agenda. New problems and issues were discussed, and old decisions and issues reassessed as circumstances required. Each consensus and each action representing the Ad Hoc Committee was discussed and voted at a plenary Ad Hoc Committee meeting.

E. In addition to plenary sessions of the Ad Hoc Committee, there have been countless meetings of Ad Hoc Committee groups such as special task forces, the attorneys' committee, the research committee, and other designated subcommittees. In addition, the Chairman has kept the membership advised by continuous memoranda, reports, letters, personal conferences, speeches at meetings, and individual and conference telephone calls.

F. Either in plenary session, or through special task forces or subcommittees, the Ad Hoc Committee has conferred with a variety of interested groups, such as trade and textbook publishers; music publishers; authors; librarians; the copyright bar; producers of films and other audiovisual material. In addition, there have been many conferences and meetings with a wide variety of educational groups and interests. Besides the many discussion meetings with the Register and his staff, Ad Hoc has participated in two structured briefing sessions for the Copyright Office, one on educational broadcasting (held at WETA, the ETV station in Washington) and another on non-broadcast uses of copyrighted educational materials.

G. The views expressed and actions taken by the Ad Hoc Committee represent a basic minimum position on which a consensus was reached.

H. The first public appearance of representatives of the Ad Hoc Committee took place on January 15, 1964 in a statement presented at the Panel of the Register of Copyrights by Harry N. Rosenfield, Esq., a Washington attorney. He was accompanied by Dr. Wigren; Dr. Fred Siebert, Michigan State University (a consultant to The American Council on Education); Eugene Aleinikoff, Esq., National Education Radio and Television Center; and Raymond Larroca, Esq., Midwest Program on Airborne Television Instruction. The statement "noted with deep concern the following unwholesome and undesirable developments in copyright revision: 1. Proposed elimination of 'for profit' limitation . . . 2. Dilution of 'fair use' . . . 3. Duration of copyright . . . ." The Ad Hoc Committee's statement proposed a special, but limited, educational exemption.

Another presentation by Ad Hoc was made before the Panel of Consultants, in New York City, on August 6, 1964.

I. Since the first public appearance of Ad Hoc Committee representatives, the Ad Hoc Committee has testified before the respective subcommittees of the House and Senate Judiciary Committees. In such instances, and with the consent and cooperation of the Congressional committees, the Ad Hoc Committee sponsored a panel discussion form of testimony in which a group of people were heard, representing different interests and problems in education, appearing under the general umbrella of the Ad Hoc Committee.

SECTION 2 -- What Education Wants From The Copyright Law

The Ad Hoc Committee believes that the current copyright law, enacted in 1909, needs revision and updating but opposes any revision which damages or unduly restricts the creative educational process in America's nonprofit school system.

The present copyright law (in the "not-for-profit" provision) gives special recognition and specific authorization for nonprofit educational uses of copyrighted educational material. The Ad Hoc Committee believes (1) that the new copyright law should continue this long-established and beneficial policy by providing special recognition and specific authorization for nonprofit educational uses in classrooms, educational broadcasting and educational technology; (2) that no copyright revision should be enacted unless it is reasonable, just and equitable in striking a fair balance between authors as the creators of copyrightable material and education as users; and (3) that copyright law revision efforts to date have been unbalanced and heavily weighted against the public interest represented by the nation's schools as users of copyrighted materials.

The Chairman of the Ad Hoc Committee succinctly stated what education wants from a copyright law:

(1) "Educators want authority for nonprofit, noncommercial educational instructors to make reasonable use of a copyrighted work for nonprofit educational purposes without the need to obtain clearances or pay royalties for such use. Educators want, and need, both a reasonable and a workable copyright law so teachers will readily know what they can or cannot do in using copyrighted materials under the law."1/

(2) ". . . we should like to reiterate that there are certain needs of education which must be protected in any revision of the copyright law. These might be best summarized in this manner: The need to make limited copies of materials for classroom use; the need to have 'fair use' extended to include educational broadcasting and educational use of computers; the need for reasonable certainty that a given use of educational materials is permissible; the need for protection in the event teachers and librarians innocently infringe the law; the need to meet future instructional requirements by utilizing the new educational technology now being made available to schools; and the need to have ready access to materials."2/

Unfortunately, good teaching practice may not always be legal copyright practice. For years, widespread use has been made of many creative teaching practices with scarcely a thought (by either copyright proprietors or teachers) of their copyright implication. But now the issue has been joined, and law suits have been threatened over some of the very teaching practices which have grown up and remained unchallenged under current copyright law. As a result, many school boards and supervisors fear that the failure to assure the legality of basically sound and reasonable teaching practices will curtail and handicap creative and imaginative teaching seriously.

The issue facing Congress today is not what is or is not legally permissible under the 1909 copyright law, but what should be allowable under a new law. As the Register told the Senate Subcommittee:

> "There is little point now in detailing the ambiguities, obscurities, omissions, and

> paradoxes of a statute which, after 56 years, still presents dozens of unanswered questions."[3]

This same view was urged by NEA's President:

> "Now that the law is at long last being revised, we urge that it be written to fit the practice rather than cut good teaching practices back to conform to the law. The law should support good practice rather than restrict it."[4]

To achieve the goal of having a copyright law "support good [teaching] practice rather than restrict it," special heed must be paid to the nature of teaching today.

As T. M. Stinnett, Assistant Executive Secretary of the NEA, advised the Senate Subcommittee:

> "Earlier teachers tended to use the same textbooks for each pupil; today's teacher uses many resources in his teaching. He has a variety of texts and supplementary materials, including trade and reference books, newspapers and magazines, educational motion pictures, filmstrips, overhead transparency projectors, record players, slides and educational radio and television, teaching machines, programmed learning materials; and he uses these in orchestration to do specific jobs. The teacher selects resources to fit particular student needs so that certain tools are used with some students and other tools with other students."[5]

The copyrighted works most needed by teachers are recent and contemporaneous materials, not text books. Teachers want to update texts and to have their classwork relevant and meaningful to current developments. It is because of such materials, and because of the newer educational technologies that most of education's copyright problems arise.

Consequently, a major issue of public policy in copyright law revision is the need to legitimitize current and developing reasonable educational practices so that teachers will not be forced either to drop them or to continue them "under the table."

It is well to note that while these educational practices developed and continued, education improved and America's publishers prospered as perhaps never before in history. Their securities are among today's "hot items" in the stock market--and this despite (or perhaps because of) the very educational practices we are discussing. Legitimitizing such and other similar creative teaching practices is good for both producers and users of copyright materials, as the CHICAGO TRIBUNE wrote editorially in connection with the Ad Hoc Committee's position:

> ". . . permitting educational, not-for-profit circulation of an author's writings might serve the writer better than an iron-clad prohibition of such circulation without written permission. After all, an author's rights do not amount to much if no one wants to read what he has written -- if no one has ever heard of him. Perhaps the school mimeograph should be viewed not as a piratical rival to a trade publisher, but as a helpful, unpaid publicity agent who helps publishers' long-term sales . . ."[6]

The Ad Hoc Committee does not believe that educational institutions should have unlimited free use of all copyrighted works without restriction. But by the same token, it does believe that public policy requires reasonable limitations upon the copyright monopoly for nonprofit educational uses in the public interest (and has submitted to Congress appropriate statutory language to this end). The Ad Hoc Committee believes that such educational uses are not only of value to the users and the public, but also to the authors. Education represents not only users, but also authors and publishers of copyrighted material.

In summary, the Ad Hoc Committee believes that education wants a copyright law which

(1) supports, rather than undermines, good teaching and learning practices;

(2) recognizes the primacy of the public interest over the author's, while striking a fair balance between authors and users;

(3) legislates specific protections for nonprofit education uses, including limited copying and recording of copyrighted materials in the classroom, educational broadcasting and educational technology, without need for clearances or royalties;

(4) provides maximum reasonable access to a wide variety of

1605

resources for teaching and learning in nonprofit educational institutions, now and in the future; and

(5) assures teachers a reasonable degree of certainty as to what copyrighted materials may be used for nonprofit educational purposes.

Less than this kind of bill the Ad Hoc Committee has said it will not accept. These principles are translated into statutory formulae by means of specific Ad Hoc Committee proposals described in the following sections.

SECTION 3 -- Limited Copying and Recording for Educational Use

Since 1909 the copyright law has specifically contained the "not-for-profit" principle, authorizing the nonprofit public performance of nondramatic literary and musical copyrighted works without requiring consent from the copyright owner. This "not-for-profit" provision protected educational uses.

Pending copyright bills destroy this basic doctrine, and substitute categorical exemptions set forth in §110 of H.R. 2512-S.597. The Ad Hoc Committee believes this to be an unwholesome retrogression contrary to public interest. On this score, the present law better serves the public interest in its broadest reach, by distinguishing between nonprofit and commercial uses of copyrighted materials and recognizing a special and primary right for such nonprofit uses. The failure of current copyright bills to make the vital initial distinction between nonprofit and commercial users is, according to Ad Hoc, a serious blind spot in the current copyright revision effort.

The Ad Hoc Committee believes that Senator John L. McClellan, Chairman of the Senate Subcommittee that held copyright hearings, expressed the wiser view of public policy:

> ". . . Once they put it out on the market, as long as somebody does not duplicate it for sale, in my judgment, so long as it is being used for educational purposes and for nonprofit entertainment, I do not think they are entitled to royalty when it is used for that purpose."1/

The revision program was not always so defective. In his 1961 Report the Register accepted and espoused continuance of the "not-for-profit" concept:

> "We believe that the principle of the 'for profit' limitation . . ., and the application given to that principle by the courts, strikes a sound balance between the interests of copyright owners and those of the public . . .. We believe, however, that any attempt to specify the various situations in which the principle applies would be likely to include too much or too little, and to raise new uncertainties."[2]

From the outset, the Ad Hoc Committee agreed with and insisted upon the "not-for-profit" concept so expressed by the Register in 1961. The Ad Hoc Committee's original proposal was a two-pronged approach for copyright revision:

I. Retention and Expansion of "Not-For-Profit" Principle, and

II. Statutory "Fair Use."

I. "Not-For-Profit" Principle

The 60-year-old "not-for-profit" principle was, in effect, an automatic but limited statutory exemption giving restricted rights to nonprofit education to use copyrighted material without clearances or royalties.

In accepting the principle enunciated by the Register in 1961, the Ad Hoc Committee proposed to effectuate it by (a) retention of the "not-for-profit" concept for nonprofit educational use, and (b) application of the concept to both (i) performance and (ii) restricted copying and recording for nonprofit educational purposes.

This objective, which has continuously been regarded as the most urgent of Ad Hoc's proposals, was formulated by the Ad Hoc Committee into legislative language as an amendment to H.R.4347-S.1006. On March 1, 1965, the Ad Hoc Committee proposed the following new proposed §111:

> "§111. Limitations on exclusive rights: Educational copies and recordings
>
> Notwithstanding the provisions of §106, it is not an infringement of copyright for anyone law-

1607

> fully entitled under §109 to perform, exhibit, or to transmit a performance or exhibition of, a copyrighted work (save those originally consumable upon use, such as workbook exercises, problems, or answer sheets for standardized tests)
>
> (a) to make no more than one copy or phonorecord of the work in the course of such use, provided that no copy or phonorecord may be made of dramatic works (including any accompanying music), pantomimes and choreographic works, and motion pictures or filmstrips unless the performers and the audience are limited to students, faculty, or staff, and
>
> (b) to make a reasonable number of copies or phonorecords of excerpts or quotations from the work, provided that such excerpts or quotations are not substantial in length in proportion to their source
>
> solely for purposes of such person's or organization's own teaching, lawful performances, exhibitions and transmissions, for course work study in connection therewith, for research or for archival purposes, provided that no such copyrighted material is sold or leased for profit and that no direct or indirect private gain is involved."

The Ad Hoc Committee's objective in connection with this proposed §111 was stated as follows:

> "In order to protect the teaching process and enable teachers to teach creatively, the Ad Hoc Committee recommends that the law be written specifically to authorize teachers to make copies or recordings for purely noncommercial teaching pruposes as follows:
>
> --a single copy of an entire work such as
>
> a poem
> a transparency of a chart, graph, diagram from a book, newspaper or a magazine
> a short story
> an essay
> a map
> a TV or radio program
> an article from a magazine

(The Committee is NOT asking for the right to make a single copy of an entire book or novel; dictionary, reference book, encyclopedia, magazine or newspaper, pamphlet or monograph; workbook or standardized test; motion picture or filmstrip.)

--Multiple copies of excerpts or quotations from copyrighted works such as excerpts from contemporary writings in a duplicated examination, the reproduction of a map or a chart from a newspaper or from a text for classroom use, the making of a diagram from a magazine for overhead projection, or the recording of a school orchestra for the purpose of self-evaluation.

(The Committee is NOT asking for the right to make copies of materials originally consumable upon use, such as workbook exercises, problems, answer sheets for standardized tests.)"[3]

On April 18, 1966 the Ad Hoc Committee issued a one-page explanation of §111's objectives, as follows:

"EXPLANATORY LANGUAGE ON AD HOC COMMITTEE'S SECTION 111

Under the present law, there is controversy whether and to what extent copies and recordings of copyrighted materials, in whole or in part, may be made for instructional purposes. Over the years, a general and largely unchallenged practice has grown up of making copies and recordings of copyrighted works or excerpts of such works for classroom use, educational television, and related teaching purposes. This practice has been defended as authorized under two aspects of the Copyright Act of 1909, as amended: (1) the not-for-profit provision and (2) "fair use."

The Ad Hoc Committee believes that teachers should be enabled to make creative use of copyrighted material in the classroom. It recognizes at the same time the possibility of abuse by individuals of the privilege of using copyrighted materials. The language of Section 111(a) will permit teachers and educational organizations to make a single copy of an entire nondramatic work for purely noncommercial teaching purposes. For example, a teacher could copy or record a poem; a transparency or a chart, graph, diagram from a book, newspaper or a magazine; a short story; an essay; a

> map; a performance by a school chorus or band for the purpose of self-evaluation; a television or radio program from a series; or an article from a magazine.
>
> The Ad Hoc Committee does not intend Section 111(a) to extend to such practices as making a copy of an entire book, novel, dictionary, reference book, encyclopaedia, magazine, newspaper pamphlet, monograph, workbook, standardized test, motion picture, filmstrip, or any other use intended to supplant the purchase of instructional material easily available through commercial channels.
>
> Section 111(b) would permit, for noncommercial educational purposes, the making of multiple copies of excerpts or quotations from copyrighted works such as excerpts from contemporary writings in a duplicated examination or classroom exercise, the reproduction of a map or a chart from a newspaper or from a text for classroom use, or the making of a diagram from a magazine for overhead projection. It would not permit copying of excerpts from materials originally consumable upon use, such as workbook exercises, problems, or answer sheets for standardized tests."

The Ad Hoc Committee's double-pronged approach (e.g., retention and expansion of the "not-for-profit" principle, coupled with statutory "fair use") is the simplest, fairest, and most certain way to serve education's needs under the copyright law.

However, the Ad Hoc Committee agreed to a compromise position, in order to achieve the same general result in a different way through

A. a revised and somewhat more specific statutory "fair use" section, and

B. a legislative history (by means of a Congressional Committee report) sanctioning approved educational practices under the copyright law. [The House Report, described below, especially mentions many examples cited by testimony and documents of the Ad Hoc Committee and its constituent groups.]

II. Statutory "Fair Use"

At the suggestion of Dr. Harold E. Wigren, Chairman of the Ad Hoc Committee, a series of so-called "summit conferences" were called by the Register of Copyrights. The top representatives of education, the publishers and organized authors were called together in June, 1966, under Chairmanship of Mr. Herbert Fuchs, Counsel to the House Judiciary Subcommittee that had been holding legislative hearings. The purpose was to explore areas of agreement and disagreement among the various interests involved, and especially areas of possible accommodation.

There were six such meetings, one devoted to classroom uses, one to "fair use," two to educational broadcasting and two to computers. Attendance was on a limited invitation basis. At these meetings, the Ad Hoc Committee was represented by a total of 18 persons, variously selected to attend a particular meeting on the basis of the agenda topic and with reference to insuring representation from all major facets of Ad Hoc's concern.

The meetings were highly significant and often witnessed a genuine effort to grapple with problems in a spirit of mutual accommodation. Perhaps the single most direct result of these "summit conferences" was an agreement upon a statutory "fair use" provision with major substantive changes in language and associated Congressional Committee reports. This agreement resulted in (a) §107 being adopted by the House in H.R.4347, 89th Congress, 2nd Session and in H.R.2512, 90th Congress, 1st Session; and (b) the accompanying House Report No. 2237, 89th Congress, 2nd Session and House Report No. 83, 90th Congress, st Session.

Section 107 reads as follows:

> "§107. Limitations on exclusive rights: Fair Use
>
> Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching, scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include:
>
> (1) the purpose and character of the use;
> (2) the nature of the copyrighted work;

> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work."

The compromise thus effectuated carried with it the agreement by the Ad Hoc Committee to forego its insistence upon its proposed §111.

This compromise must be understood in the light of the voluminous testimony and the heated controversy on the uncertainties of "fair use" for educational purposes under present law. The Ad Hoc Committee consistently regarded "fair use" as insufficient to be the principal means for meeting education's needs because of "fair use's" uncertainty and unreliability. Dr. Wigren testified thus:

> ". . . statutory fair use is not enough for education to do its job. Fair use is not a sufficient guideline to the classroom teacher to know when copyrighted materials may or may not be used. Under the present law we have fair use judicially interpreted plus the 'for profit' limitation. Under H.R.4347 we have statutory fair use merely mentioned and no 'for profit' limitation. Substituted for the 'for profit' limitation is a most inadequate and limited §109 which gives categorical exemptions rather than a uniform general one."[4]

At various Congressional hearings, Ad Hoc's Counsel, Harry N. Rosenfield, went into considerable detail as to the uncertainties of "fair use" for teachers. (For a general analysis of this point, see Exhibit 2.)

The House Committee itself officially recognized this situation:

> "Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged."[5]

Therefore, the House Committee adopted the compromise as a means of "recognizing the need for greater certainty and protection for teachers" (p.31). Thus the House Committee's Report specifically states:

> "The committee sympathizes with the argument that a teacher should not be prevented by uncertainty from doing things that he is legally entitled to do and that improve the quality of his teaching. It is therefore important that some ground rules be provided for the application of fair use in particular situations." (p.32).

Therefore, the Report is designed to

> "provide educators with the basis for establishing workable practices and policies." (p.33)

Consequently, in the light of the entire legislative history the Ad Hoc Committee believes the total compromise on "fair use" (developed at the "summit conference" and adopted in the House bill and Committee Report) gives to "fair use" a statutory and Congressional infusion of positive doctrine where prior judicial gaps prevailed. As Ad Hoc sees it, the effect of the House bill and report, taken together, is to write into statute the basic position (although not necessarily all the specifics) espoused by the Ad Hoc Committee in connection with its proposed statutory authorization for limited educational copying and recording.

The Ad Hoc Committee's acceptance of the compromise was based upon the recognition and joint presence of five essential and indispensable elements, in proper and agreed-upon balance, as follows:

A. Statutory recognition of "fair use" as a permanent right under copyright law.

This essential element involves two aspects:

(1) adoption of the full text of §107 as voted by the House, without any textual changes whatsoever.

Efforts on the part of some members of the copyright proprietors' community to seek so-called "clarifying" or other changes are unacceptable to Ad Hoc.

(2) "Fair use" is a permanent provision in the copyright law, in no way to be diminished by any proposed clearing house or licensing system. [For comments on a copyright clearing house, see Exhibit 3.]

"Fair use," and the limited educational copying and recording it specifically authorizes by statute, is not an occasional or merely casual right; it is a constant and continuing right. Under the compromise, "fair use" is a fundamental and permanent statutory charter for education. "Fair use" is not given by leave of the copyright owner, but is specifically and statutorily reserved for education by Congress out of the copyright monopoly. It is not a privilege awarded by the publisher, but a right specified by law.

One witness before Congress was candid enough to state that he regarded fair use "as a temporary safety valve until some clearing house system is established. At that time, the concept of fair use should lose its importance and die off as some form of vestigial tail."[6] If this is true, Ad Hoc wants nothing of such phoney "fair use," and is free of any commitment to the compromise agreement.

B. Inclusion of words: "for purposes such as criticism, comment, news reporting, teaching, scholarship, or research."

C. Inclusion of words: "including such use by reproduction in copies or phonorecords or by any other means specified by that section [§106]."

Such language would be the first statutory recognition that "fair use" includes copying and recording, and was designed and accepted to settle clearly and unmistakably the legal right of education to photo-duplicate and record within the limits of "fair use."

There is imminent danger of a complete breakdown in connection with this indispensable element of compromise. The Senate adopted S.2216, 90th Congress, 1st Session, to set up a National Commission on New Technological Uses of Copyrighted Works. One provision in this bill is in effect a major textual change of §107 which is an unacceptable change in meaning and purpose of §107, and therefore renders both S.2216 and §107 unacceptable to the Ad Hoc Committee. Section 1(b)(2) of S.2216, as explained by the Senate Report, completely reopens the whole issue of photoduplication, which the compromise agreement was supposed to settle and close under §107.

Section 1(b)(2) reads as follows:

> "(b) The purpose of the Commission is to study and compile data on the reproduction and use of copyrighted works of authorship . . . (2) by various forms of machine reproduction."

The Report of the Senate Committee states in general terms:

> "It is not the intention of the committee that the Commission should undertake to reopen the examination of those copyright issues which have received detailed consideration during the current revision effort, and concerning which *satisfactory solutions appear to have been achieved*."[7] [emphasis added]

However, when the Senate Committee's report gets to the specifics of photoduplication, quite another situation seems to prevail:

> "Another important copyright issue arising from technological developments is the reproduction of copyrighted material by use of various machines. *Photocopying in all its forms presents significant questions of public policy, extending well beyond that of copyright law. No satisfactory solutions have emerged in the limited consideration devoted to this problem during the current revision effort*. Therefore, the establishment of some type of study commission appeared to be both necessary and desirable." (p.2) [emphasis added]

The Senate Committee's Report incorporates a report from the Librarian of Congress on his and the Register's behalf. This latter report comments:

> "The scope of the Commission's aims and duties is stated in a way that is broad enough to cover a wide range of significant uses of copyrighted material by automatic data transfer systems and reproducing devices, but not to include review of problems that have been the subject of extensive separate study, such as uses by community antenae television systems or typical educational broadcasting stations." (p.5)

The Ad Hoc Committee notes with dismay the failure to exclude from the Commission's scope of duty the matter of "fair use" by photoduplication and recording.

At its meeting of March 13, 1968, the Ad Hoc Committee reaffirmed its opposition to §1(b)(2) in the light of the Senate Committee's report. Dr. Wigren wrote to the Register on April 18, 1968, as follows:

> ". . . it reopens the entire issue of photocopying and fair use of copyrighted materials for schools, an issue which we all assumed was settled by the agreements that the House committee adopted in its report."

Unless §1(b)(2), as so interpreted, is eliminated, the Ad Hoc Committee regards the compromise agreement as having been abrogated, and therefore will be free to return to its original position or take some other position in the legislative debates of 1969.

D. Inclusion of the following four criteria for "fair use"

> "(1) the purpose and character of the use;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion in relation to the copyrighted work as a whole; and
> (4) the effect of the use upon the potential market for or value of the copyrighted work."

E. Inclusion of a suitable legislative history in the Congressional Committee's report.

The Ad Hoc Committee receded from its original two-pronged approach and its proposed §111 and accepted a compromise involving a rewritten "fair use" provision and a clear legislative history only upon the basis of the iron-bound Congressional assurance that

> "the doctrine of fair use, as properly applied, is broad enough to permit reasonable educational use."[8]

The objective of infusing some reasonable degree of certainty into "fair use" was a sine qua non for Ad Hoc, was accepted at the "summit conferences", and was adopted by the House Committee, as indicated above (p.37). This certainty was to derive not only from the language of the bill, but also from the Congressional Committee's report. As the House Committee's Report put it,

> "It is therefore important that some ground rules be provided for the application of fair use in particular situations." (p.33)

Thus, it set forth its "intention . . . with respect to the application of the fair use doctrine in various situations" (p.31), as a means of providing some degree of reasonable certainty so that teachers may continue superior teaching practices without fear of infringement or liability.

All of this need for certainty was especially true in the field of copying and recording copyrighted works. According to the Copyright Office's General Counsel, no court under existing law had "ruled specifically on cases involving the reproduction of copies for purposes of research or teaching."[9] The House hearings are replete with disagreements among copyright law experts as to just how far, if at all, fair use allows copying, either in single or multiple copies. The House Committee's Report itself recognized the need to provide teachers with some degree of certainty on copying, particularly in terms of the four statutory criteria:

> ". . . some explanation of the considerations behind the language used in the list of four criteria is advisable. This is particularly true as to cases of copying by teachers, since in this area there are few if any judicial guidelines." (p.32)

The Report specifically recognized the need to explain the language in §107 that "fair use" included "such use by reproduction in copies or phonorecords or by any other means specified . . ." because

> ". . . of the lack of any judicial precedent establishing that the making of copies by a teacher for classroom purposes can, under appropriate circumstances, constitute a fair use . . ." (p.33)

Therefore, statements in the Committee's report on copying are of particular significance. And there is one such statement which negates the compromise agreement, so far as the Ad Hoc Committee is concerned. As indicated, one of the required elements in the compromise was that Section 107 should set forth four of the criteria which may be used for determining "fair use." Ad Hoc's agreement to the compromise is correctly stated in the House Committee Report's comments that the fourth criterion "must always be judged in conjunction with the other three criteria," (p.35) and that the four criteria "must be applied in combination with the circumstances pertaining to the other criteria." (p.32) However, these statements--which are the essence of the compromise agreement--are wholly vitiated by another statement in the House Report dealing with the fourth criterion [*e.g.*, "the effect of the use on the potential market for or value of the work"], as follows:

> "Where the unauthorized copying displaces what realistically might have been a sale, *no matter how minor the amount of money involved*, the interests of the copyright owner need protection." (p.35) [emphasis added]

The language "no matter how minor the amount of money involved" has been aptly called "a sort of De Minimis rule in reverse."[10] It flies in the face of the combined consideration of all four criteria and prevents dealing with all four criteria in conjunction with each other. It seems to be a categorical assertion which, in effect, wipes out the other three criteria. At the very least, it creates such uncertainty as to vitiate the meaningfulness of the entire section and to prevent it from operating as it was intended, to authorize limited copying and recording for educational purposes.

The House Report's restrictive language on the fourth criterion in §107 is all the more important because the Report states that this fourth criterion is "often the most important of the criteria of fair use." (p.35)

The Ad Hoc Committee *never* accepted--and does *not* now accept--any compromise agreement whereby it foregoes its original proposal

1618

for a limited statutory exemption, as proposed by its §111, for a "fair use" provision interpreted by the language "no matter how minor the amount involved."

For the Ad Hoc Committee, all five elements, jointly, are essential and indispensable to its acceptance and the continued viability of the compromise agreement. If any are missing, the Ad Hoc Committee is no longer bound by any such compromise, and it will revert either to its original position or to another position suited to protecting education's interest under the copyright law. This position was reaffirmed by the Ad Hoc Committee on October 16, 1968.

III. Waiver of Statutory Damages

Under present law, any infringement--no matter how innocent, no matter how harmless--subjects the infringer to minimum mandatory statutory damages of $250 for each infringement.

The Ad Hoc Committee has consistently urged that the copyright law grant discretionary authority to the courts to waive all statutory damages for innocent infringement in a nonprofit educational situation. In the current revision bills, Section 504(c)(2) provides such discretion only to

> ". . . instructors in a nonprofit educational institution . . . in the course of face-to-face teaching activities in a classroom or similar place normally devoted to instruction . . ."

The Ad Hoc Committee has some qualms whether the definition of innocent infringement is so rigid as to be self-defeating. In addition, the Ad Hoc Committee urgently proposes that the waiver be extended to educational broadcast teachers and to librarians. The rationale for including such groups is identical with one of the basic purposes of the Ad Hoc Committee's proposal for §111 and its later acceptance of the "fair use" compromise. That purpose, as recognized by the House Report is, "the need for greater certainty and protection for teachers" (p.31). Educational broadcast teachers and librarians need and merit this same "greater certainty and protection."

SECTION 4 -- Reasonable Use of New Educational Technologies

New educational technology of one kind or another is burgeoning. Although the major purpose of copyright revision efforts is to update the 1909 law, current bills freeze use of such educational technology to the level of 1960's developments and make no allowance for new technology in teaching and learning. There are a whole series of such technologies, the educational use of which is threatened by copyright revision, including

I. various audio-visual devices designed for individualized and independent learning;

II. educational broadcasting; closed circuit cable and microwave (ITFS, 2500 megahertz);

III. educational use of computers and other electronic retrieval and storage devices.

I. Individualized Instruction

Teaching and learning have been changing in America's schools. Instead of "class" work, more and more teaching emphasis is on "individuals" or small groups. Such individual approaches require materials for individual students presented either by the teacher or through a listening center in a tutorial situation or by an audio- or video-retrieval system. Increasingly, students take more and more responsibility for their own learning and are provided opportunities for self-directed, informal, unsystematic learning activities to replace systematic, instruction-teaching activities. Record players and tape recorders with earphone sets are becoming common in schools at all levels, to bring the learning materials to the students. One of the most rapidly growing developments is the audio-remote-access system, sometimes referred to as "dial-access." There are also a few video remote-access systems. In such educational technology, the transmission of the material is activated by the students, not by teachers. This is a creative and fruitful learning process.

Section 110(2)(C) of H.R.2512 [which is identical with S.597's §110(2)(D)] virtually eliminates individualized student use of copyright material in such system. This section denies copyright uses where the work is on a student-activated transmission from a computer or other storage and retrieval system. What is here involved is "dial access" programs, computer-assisted instruction, and similar new educational technologies. This section virtually bars individualized uses of the newer educational classroom technology whose purpose is to encourage independent learning activities. This provision is highly deleterious to effective teaching as educational technology now knows it, no less than to what is in prospect.

Take for example the foreign language laboratory. Schools buy tape-recorded speech patterns for students to imitate. When the tape is used on a machine in the room where the student is located (so that transmission is unnecessary), §110(2)(C) of H.R.2512 does not apply. Where the tape is used by means of a machine which transmits the sounds at a teacher's activation, the section does not apply. But where the identical tape is used in the identical machine, but is activated by a student, even if he is in the same room with the teacher, this would be forbidden by the section in question. Or if the student was ill and absent and tries to make up the lesson later on the very same system, it is barred. It must be noted that here there is not necessarily any question of copies. Schools are using mostly tape they bought for the very purpose for which it was purchased, e.g., to be heard by the student in order that he might learn by imitating a purchased tape. There is an internal inconsistency in the bill: if a teacher pushes the button, so to speak, the use of copyrighted material on such a transmission is permissible; if a student does, it is impermissible.

The reason given for this inconsistency is that activation of the system by individual students substitutes for purchase of copies. The argument is invalid. In most cases, no copyright at all is involved (and consequently no deleterious effect on sales). Education here is not copying copyrighted works, but only displaying or performing the very copyrighted work which was bought for the purpose of display or performance.

Dr. Anna L. Hyer, Executive Secretary, Department of Audio-visual Education, NEA, testified in the Senate under the Ad Hoc Committee's umbrella, as follows:

> "The proposed copyright law seems to make the modern information delivery systems illegal . . . . If bill 597 now goes through as it is, we feel we will be required to use horse-and-buggy methods of performance and display with new technological developments."[1]

Education is increasingly moving in the direction of individualized learning. It is becoming less and less teacher-oriented and more and more student-oriented. Section 110(2)(D), S.597, is a body-blow to all this. The Ad Hoc Committee has indicated that it will not accept any copyright revision bill which includes §110(2)(D) as it appears in S.597.

II. Educational Broadcasting

The Ad Hoc Committee originally proposed retention of the "not-for-profit" concept in the revised copyright law. That principle is now, and would be, applicable not only to instructional use of copyrighted material, but also to general, cultural and community programs on educational broadcasts.

As part of its general compromise, the Ad Hoc Committee now seeks a specialized and limited exemption only for instructional broadcasting uses of copyrighted material.

Educational radio and ETV stations must operate wholly noncommercially. They are licensed by the FCC only to nonprofit educational organizations such as public school systems, universities, State Departments of Education and nonprofit community educational corporations. These stations are small, with few employees and very limited budgets.

Especially with ETV, excellence and diversity of programming will depend upon interconnections of stations by means of actual electronic interconnections or by recordings. ETV stations, in particular, use copyrighted materials such as photographs, maps and charts, literary material and music. Under the present law's "not-for-profit" provisions, such copyrighted materials may be used in local educational broadcasts without clearance or royalties.

The two current bills have differing provisions applicable to educational broadcasting, although both started out identical. H.R.2512 was amended on the floor of the House so that §110(2) and §112(b) substantially differ from the comparable provisions of S.597. The Ad Hoc Committee recommends adoption of the House version, with additional provisions.

The Ad Hoc Committee's recommendations in this area relate to the following matters:

A. The difference between closed circuit and open channel broadcasting

S.597 and the House Report on the similar provisions of H.R.2512 (see p.41, 2nd full paragraph) fail to distinguish between closed circuit or point-to-point instructional broadcasting, on the one hand, and open channel broadcasting, on the other. This failure is based upon an error of fact. Closed circuit transmissions and ITFS consist of limited, controlled systems within the schools; they are controlled or closed transmissions not available to the public and are only extensions of the classroom. It is unrealistic and unreasonable to treat them just like open channel broadcasts which can be picked up by anyone who tunes in. As Dr. Anna L. Hyer, Executive Secretary, Department of Audio-visual Education, NEA, testified before the Senate Subcommittee:

> "We feel then, that closed-circuit television should be accorded equal status with face-to-face teaching, because in modern technology they are almost the same."2/

Consequently, the Ad Hoc Committee believes that closed circuit or controlled transmission should not be subject to §110(2) which deals with open channel broadcasting, but should be subject to a new proposed §110(1A). The text of this proposal, as submitted to the Senate Subcommittee, is as follows:

> "Section 110. Limitations on exclusive rights: Exemption of certain performances and displays.
>
> Notwithstanding the provisions of section 106, the following are not infringements of copyright:
>
> (1) . . .
>
> (1A) performance or display of a work by instructors or pupils by or in the course of a closed transmission by a governmental body or other nonprofit organization if such performance or display is in the course of the teaching activities of a nonprofit educational institution.
>
> (2) . . .
>
> [NOTE: Underlined matter is proposed new language]
>
> [NOTE; It is the intent of the Ad Hoc Committee on

1623

> Copyright Law Revision that 110(1A) refer to controlled or closed transmissions and that 110(2) refer to uncontrolled or open transmissions.]"3/

B. The 100-mile Limitation

§110(2)(B) of S.597 allows educational broadcasts of copyrighted material only if

> "the radius of the area normally encompassed by the transmission is no more than 100 miles."

This provision was deleted from H.R.2512 as passed by the House.

The Senate bill's provision has particularly heavy and harmful impact on ETV, since practically half of all ETV stations share some programs on a simultaneous basis with at least one other ETV station. Such arrangements will continue to grow. If the 100-mile limitation is enacted, it will drastically impair ETV's effectiveness.

State-wide instructional broadcasting is an important teaching tool in the effort of States to provide high quality instruction to all their people. Such state-wide systems now exist in 13 states or jurisdictions (Alabama, California, Connecticut, Georgia, Hawaii, Maine, Minnesota, Nebraska, North Carolina, Oklahoma, Oregon and South Carolina, as well as in Puerto Rico). They are also under construction in six others: Kentucky, Mississippi, New Hampshire, New York, South Dakota and Vermont. The 100-mile provision would cancel out any such instructional broadcasting in these states.

The Ad Hoc Committee recommends and urges the provision of §110(2)(A) and (B) as passed by the House in H.R.2512 [but not (C)] as follows:

> "§110. Limitations on exclusive rights: Exemption of certain performances and displays
>
> Notwithstanding the provisions of section 106, the following are not infringements of copyright:
>
> (1) . . .
>
> (2) performance of a nondramatic literary or musical work, or display of a work, by or in the course of a

transmission by a governmental body or other nonprofit organization, if:

(A) the performance or display is a regular part of the systematic instructional activities of a governmental body or a nonprofit educational institution; and

(B) the transmission is made primarily for:

(i) reception in classrooms or similar places normally devoted to instruction, or

(ii) reception by persons to whom the transmission is directed because their disabilities or other special circumstances prevent their attendance in classrooms or similar places normally devoted to instruction, or

(iii) reception by officers or employees of governmental bodies as part of their official duties or employment . . ."

C. Recordings -- number and period of use

S.597 permits only two recordings of a program and -- except for one copy for purely archival purposes -- requires destruction of the copy within one year after its first broadcast, §112(b). This provision was eliminated in the House-passed H.R.2512 which authorized copies or phonorecords of a particular program without such harmful limitations to education.

(1) Number of Recordings

S.597 would allow two copies, only one of which may be used for actual broadcast and for exchange with other stations. Having only one copy of the Thanksgiving history lesson to send to other areas means that at best it could be mailed (the most common shipping method) to only one or two other areas, or they would have their Thanksgiving program some time after Christmas.

In order that ETV may be effective, multiple copies are required. The exchange practice of ETV stations require multiple copies for reasonable contemporaneous broadcast. The station broadcasting such an exchanged program would, if it produced the program itself, have the right to use the copyrighted materials without clearance and royalties.

(2) Period of use of recordings.

School curricula are composed of lessons repeated annually to

1625

the new age groups coming into school. A one-year privilege allows only one re-use of a school lesson, providing that the calendar hasn't added an additional day to the year in the meantime.

More than one-third of all ETV lessons today are repeat broadcasts of lessons more than one year old. And roughly 80% of all lessons proposed for broadcast today are prepared with the expected life well in excess of one year. To require the destruction of a broadcast lesson after one year, and the remaking of the identical lesson on a new tape next year, is a gross waste of time and talents. For such lessons ETV requires a life as long as the program has utility.

The Ad Hoc Committee recommends and urges the provision of §112(b) as passed by the House in H.R.2512 as follows:

> "(b) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a governmental body or other nonprofit organization entitled to transmit a performance or display of a work, under section 110(2) or under the limitations on exclusive rights in sound recordings specified by section 114(a), to make copies or phonorecords of a particular transmission program embodying the performance or display."

D. "Fair Use"*

A most unsatisfactory situation arises out of the statement in the House Report (p.36) which discriminatorily restricts "fair use" for educational broadcasts and seems to suggest a separate and more limited "fair use" for educational broadcast teachers than is available to other teachers. The House Report language could very well negate entirely the application of "fair use" to educational radio and television teachers.

As the Ad Hoc Committee testified before the Senate Subcommittee:

> ". . . the 'fair use' needs of teaching are the same whether over the air or in the classroom"[4/]

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* Section 3 of this paper discusses "fair use" under §107 which is identical in language in both H.R.2512 and S 597.

1626

The Ad Hoc Committee rejects any special restriction on "fair use" for broadcast teachers as unfair, unjust and unreasonable.

E. Licensed Uses

The Ad Hoc Committee believes that there are two levels of use of copyrighted materials by educational broadcasters:

1. those permissible by reason of the limited exemptions which the copyright law should provide, and through statutory "fair use"; and

2. those for which reasonable fees should be paid.

In this latter connection the Ad Hoc Committee proposed to the Senate Subcommittee that where such exemptions or "fair use" are inapplicable, the copyright statute should provide for licensed use of copyrighted materials for nonprofit educational transmissions, at reasonable fees. It is absolutely essential to note that this statutory licensing proposal is not intended in any way to impinge upon either the statutory exemptions or on "fair use," but rather merely to supplement those provisions as applicable to educational broadcasting.

As a means of consolidating into one section all the provisions specifically applicable to educational broadcasting, the Ad Hoc Committee proposed to the Senate Committee a new section to be substituted for Sections 110(2) and 112(b).[5/] This proposal is set forth in Exhibit 4.

III. Educational Use of Computers

Computers (using the term in its broad range) are the fastest growing technological developments in American education today. Nevertheless, the question of their impact on the copyright law was not really discussed or debated in any substantial manner before H.R.2512 was passed by the House. The pending bills do not mention "computers," as such, but they do cover computer use in §110(2)(D) of S.597 [and the identical §110(2)(C) of H.R.2512]. Implicitly, the matter is also covered in §§101, 102, and 106. The language of the bills, plus the statements in the House Report, create serious problems for educational computer use of copyrighted materials.

1627

A. Input and Infringement

The computer is a new communications medium. It is a technology about which we know relatively little at this point. Despite this, the pending bills would force legislative decisions on the interrelationship between computer technology and copyright policy before there has been any thorough study of the implications of such interrelationship.

In order that there might be an adequate factual and policy consideration of this interrelationship, the Ad Hoc Committee proposed at the "summit conferences" that a commission be created to study and report. (The Commission under S.2216 will be described below.) There was general agreement with the idea, but a major point of difference was to be the interim status of input into computers.

The Ad Hoc Committee's position is that at least for the interim period while a study was being made,

1. mere input into a computer for nonprofit educational purposes should not be infringement, and

2. questions of permissibility of use, "fair use" and royalties should arise only at the output stage.

The rationale for this so-called "moratorium" for the interim study period was stated by Dr. Fred Siebert, Dean of the College of Communications Arts, Michigan State University, and copyright consultant to the American Council on Education, who served as chairman of a subcommittee of the Ad Hoc Committee which adopted the subcommittee's recommendations. Dean Siebert testified on computers at the Senate Hearings under the Ad Hoc Committee's umbrella:

> "We contend that this language of the House report, together with section 106, extends copyright protection to computer transmission uses, and tends to freeze the law in favor of the copyright proprietor and to the detriment of the copyright consumer during this transition period of development and experimentation. We submit that the restrictions imposed by this bill and the accompanying House report will seriously hamper instructional uses of the newer devices as well as scholarly and scientific research and experimentation, and consequently harm the public interest."7/

Another Ad Hoc Committee witness, Professor Arthur R. Miller, University of Michigan Law School, stated that §110(2)(D) of S.597

> "imperils the ability of education to use computers and computer-associated instruction at all levels of education and destroys a long standing practice of legislative relief for the teaching profession from certain copyright restrictions. . .. this is not a neutral bill and section 110(2)(D) demonstrates that."[8] .

As to input, Professor Miller testified:

> ". . . it is clear that the revision bill makes it a copyright infringement to input copyrighted materials into a storage and retrieval system without regard to the possibility that the copyrighted materials may never be used in a way that will have any economic toll on the copyright proprietor."[9]

Senate Hiram L. Fong, in a colloquy during the hearings, said that charging for input is like a restaurant imposing a cover charge for looking at the menu, without regard to whether any food was ever ordered.[10] In a later appearance as a witness, under a different aegis, Professor Arthur R. Miller, said to Senator Fong:

> ". . . if we are to use modern information transfer technology in an efficient and socially rewarding way, education must be able to look at the menu. Educators and scholars have to be permitted to input materials into the system. They have to be able to look at certain material in computer readable form to see if they want to use it, if they want to bring it out in the form of output or do anything else to it that looks like a traditional copyright infringement. . . . But a user may not know whether the copyright material is useful to him until he can get it into the machine and examine it in ways that would be wholly noninfringement under traditional copyright doctrines.

> "Educational institutions buy books; they put them on their library shelves. An English professor goes to the library, pulls Tennessee Williams off the shelf and reads it. That is not an infringement. He may sit there and count the number of times Tennessee Williams uses certain antisocial words. That is not a copyright infringement. He may have research assistants analyze and manipulate the paragraphs, looking for sentence structure and systactical identities within the work. That is not a copyright infringement. Yet under Senate bill 597, if our English professor wants to input the same novel into a data storage and retrieval system to perform the same noninfringing functions, he is infringing because according to the bill, input --looking at the menu--is an infringement."[11]

The impact of these provisions in making input an infringement is seriously to restrict the development of educational computer technology. Such requirement would prejudice development of the technology and inhibit experiment designed to ascertain the capacity of these new data processing devices.

Failure to adopt the Ad Hoc Committee's position of a moratorium relative to input during the study period would render a fair test of the situation impossible and therefore would cripple the Commission's study. Unless input were not a copyright infringement during the study, neither education nor copyright owners would have the opportunity to experiment with the effect of educational uses of copyrighted works in computers. Educational users would be forced to make advance, unnecessary, and premature decisions as to whether they would ever use (or output) the input materials. The whole purpose of the Commission's study as well as of the technology would be thwarted by compulsion to decide output before input. As professor Miller put it, "this bill, in a host of ways, is too prejudiced against the storage and retrieval system to permit balanced experimentation."[12]

The Ad Hoc Committee's most recent statement on input was included in its resolution of March 13, 1968 as follows:

> "For the period terminating one year after submission of the final report of the Commission on New Technological Uses of Copyrighted Works, reproduction of copyrighted works of authorship

> for input in automatic systems capable of storing, processing, retrieving, and transferring information shall not be an infringement of copyright. Thereafter, unless Congress provides otherwise, the legal status of such reproduction shall be determined under the 1909 law."

This position was reaffirmed by the Ad Hoc Committee on October 16, 1968.

B. Computer programs

A computer program consists of the instructions to a computer as distinguished from the data stored in, and retrieved from, the computer.

Section 102 appears to extend copyrightability to such computer programs as such. The Ad Hoc Committee opposes such provision as unwise and improper.13/

C. National Commission*

S. 2216 would establish a National Commission on New Technological Uses of Copyrighted Works. The Ad Hoc Committee is concerned about the Commission's composition, and believes that there should be a broader public representation. As now envisaged, the Commission consists of two contending sides with a third group acting as arbitrators. The Ad Hoc Committee believes that public representation (not the "interest groups," so called) should predominate in the Commission. In this connection, the Ad Hoc Committee adopted a resolution on July 10, 1967 which contained the following relevant positions:

(1) "That such a Commission be independent, not within the Library of Congress or within any agency of the Government."

(2) "That such a Commission be composed of 15 members, with the President to appoint 9 of them 'representing the public interest generally and with some knowledge of

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* See p. 17 *et seq*. for impact of S.2216 upon photocopying and "fair use."

> the field.' The other 6 were to be equally divided between copyright interests and copyright users 'in education, research, and scholarship.'"

This position was reaffirmed by the Ad Hoc Committee on October 16, 1968.

SECTION 5 -- Education's Needs as Affected by Copyright Duration

As previously indicated, education's most pressing need in the copyright law is assurance of reasonable access to copyrighted materials within basic principles. An overriding element in this connection is the term or duration of copyright.

Since one of its earliest meetings, held in Washington, the Ad Hoc Committee has consistently opposed copyright law revision proposals which would radically change the present duration of copyright by adopting a base period measured by the life of the author plus fifty years. The public interest is damaged by efforts to extend the period before which copyrighted works go into the public domain. The Ad Hoc Committee recommends retention of the present law's provision, a 28-year initial period plus a 28-year renewal period. As an alternative, it favors the Register's own proposal in his 1961 Report to the Congress: a 76-year total term, comprised of an initial 28-year term plus a 48-year renewal term.

Since the first American copyright law in 1790, a renewable term has been the characteristic hallmark of our copyright law. The original U.S. copyright law allowed only a 14-year period plus a 14-year renewal. The present law provides for an initial period of 28 years copyright, renewable for a similar period of 28 years after which the work goes into the public domain. The copyright owner's non-renewal puts the work in the public domain after 28 years, and thus education may use such material for its purpose.

The Ad Hoc Committee is principally concerned, in connection with duration, that the renewal requirement be retained because of its effect on the passing of copyrighted material into the public domain. An official Copyright Office study shows that only 15% of all registered copyrights are being renewed at the present time.[1/] Therefore, the proposed duration for life-plus-50 would deprive education, in some instances for 100 years, of the present right to use 85% of all registered copyrights after 28 years.

The Ad Hoc Committee believes that the Register of Copyrights was correct in 1961 when he opposed elimination of the renewal requirement:

> "We do not believe that the maximum term of copyright--which we are proposing be 76 years from first public dissemination--is necessary or advisable for all works. Experience indicates that the present initial term of 28 years is sufficient for the great majority of copyrighted works; less than 15 percent of all registered copyrights are being renewed at the present time.
>
> "The percentage of renewals varies from one class of works to another. During a recent year, for example, renewals ranged from 70 percent of the eligible motion pictures, down through 35 percent for music, 11 percent for periodicals, 7 percent for 'books' (which includes text material published in various forms) to less than 1 percent for technical drawings."[2]

The Ad Hoc Committee's recommendation -- identical with that of the Register in 1961 -- accomplishes the two objectives of protecting both the author and user of copyright materials, while the life-plus-50 proposal totally ignores and jeopardizes the user's interests. The Ad Hoc Committee's recommendation of 28 years plus 48 years renewal period

1. protects the user, by enabling education to use the 85% of all copyrighted materials which are not renewed, beginning with the 29th year instead of waiting for 100 or so years; and

2. protects the author, by providing the same span of protection, for authors who want it, as contemplated by the life-plus-50 plan.

The Register's Report to Congress in 1961 stated:

> "A term of 76 years from the first public dissemination would be generally equivalent to the term most prevalent in foreign countries . . . Thus, . . . this term would achieve

> the main purpose of those who have advocated a term of 50 years from the death of the author."[3]

In his testimony on S.1006, the Register again said in 1965:

> "Life-plus-fifty is roughly equivalent, on the average, to a term of 75 years from publication . . ."[4]

Comment is appropriate on two unjustifiable claims made by proponents of life-plus-50:

1. Relation to Foreign Law

One of the main justifications advanced for this proposed radical departure from established American copyright practice of copyright renewal and duration is the assertion that it is necessary for American copyright duration to correspond with that of foreign countries. The spuriousness of this argument is described in Exhibit 5.

2. Usefulness of Material in Public Domain

Proponents of life-plus-50 claim that public domain after 28 years is of no real value to education. Here again the Ad Hoc Committee accepts the comments of the Register's Report of 1961:

> "Advocates of a uniform single term contend that even though most works have little or no commercial value beyond 28 years, it would do no harm to let their protection continue for the maximum term. They argue that no one is interested in using a work after it has ceased to have commercial value, so the continuation of copyright would be of no practical consequence.
>
> "We believe that this argument is fallacious on two grounds:
> --Many works that have ceased to have substantial commercial value in themselves are still useful to scholars, researchers, historians, and educators, as well as to authors of new works based on preexisting ones.
> --The argument seems to assume that the public

> derives no benefit from having works in the public domain. Copyright protection for a certain period is essential to foster the creation and dissemination of intellectual works and to give authors their due reward. .. But on the other hand, there are many circumstances in which copyright restrictions inhibit the dissemination of works or their use in the creation of new works.
>
> "We believe that, when authors or other copyright owners feel that they have no need for a longer term, the termination of copyright restrictions after 28 years is in the public interest."5/

Lastly, as a matter of legal principle and public policy, it is noteworthy that the U.S. Department of Justice has opposed extension of the term beyond 56 years, as an unwarranted monopoly:

> "The Department of Justice is opposed to lengthening the period of copyrights. Copyrights (and patents) are forms of monopolies and should not be extended for periods longer than those now provided by law. The present 56-year monopoly granted to authors is in our view fully adequate to reward authors for their contributions to society. Considering this matter from the viewpoint of the public, which is interested in the early passing of copyrighted material into the public domain, it would seem unwise to extend further the copyright monopoly."6/

The Ad Hoc Committee submitted to the Senate suitable language for its proposal on duration of copyright7/, and this position was reaffirmed by the Ad Hoc Committee on October 16, 1968.

SECTION 6 -- Basic Principles of Public Policy

The Ad Hoc Committee believes that there are three basic principles of public policy that should be determinative of copyright legislation:

I. Reasonable Limitation of Monopolies

"Copyrights," the Attorney General of the U.S. wrote to the

Congress, "are forms of monopolies . . ."[1] "Even at its best," wrote the Assistant Librarian of the Supreme Court, "copyright necessarily involves the right to restrict as well as to monopolize the diffusion of knowledge."[2]

Since 1909 Congress has steadfastly exempted nonprofit educational uses from the possibility of restriction on the diffusion of knowledge by such copyright monopoly. The Ad Hoc Committee has urged that, in the public interest, this same kind of Congressional protection for education be written into any new copyright law in order to meet the needs of education for

A. a more effective and more inclusive accomplishment of the long-standing policy of special recognition for education;

B. a clarification of ambiguities so that teachers may readily and easily know what they can legally use in teaching our nation's students; and

C. a logical and reasonable extension of presently available rights under copyright law in order to make effective teaching possible.

II. The Issue is One of Public Policy, Not Property Rights

Some claim that copyright is a fixed property right and that therefore Congress has no authority to enact copyright legislation protecting education. This is simply not so. A long line of Supreme Court and other cases have held that the scope of copyright protection is a privilege, a creature of statute, and wholly a matter of Congressional discretion to grant or withhold. The House Committee's report on the present copyright law said that "Congress has the power to annex to them [copyrights] such conditions as it deems wise and expedient."[3]

This view was again confirmed by the Supreme Court as late as June 17, 1968 in the CATV case.[4]

A fuller analysis of this question appears in Exhibit 6.

III. Primacy of the Public Interest

The Congress, the Supreme Court, and the Register of Copyrights have all affirmed the primacy of the public interest over the copyright proprietor's interest:

A. The House Report on the present law stated that copyright was enacted

> "not primarily for the benefit of the author, but primarily for the benefit of the public."[5]

B. The Supreme Court has said:

> ". . . the copyright law . . . makes a reward to the owner of secondary consideration."[6]

C. The Register of Copyrights stated to Congress in his 1961 Report:

> "Within limits the author's interests coincide with those of the public. Where they conflict the public interest must prevail. . . . And the interests of the authors must yield to the public welfare where they conflict." (p.6)

> "The needs of all groups must be taken into account. But these needs must also be weighed in the light of the paramount public interest." (p.xi)

Copyright proprietors are demanding a greater and more inclusive monopoly. It is for the Congress to decide what protection against such monopoly is to be required for the public interest represented by nonprofit education.

The Ad Hoc Committee believes that education is the most universal expression of public interest in the United States. It will be in "the paramount public interest" for the Congress to enact the proposals of the AD HOC COMMITTEE, in order to enable teachers to make reasonable and limited nonprofit use of copyrighted materials for the vital task of educating the school children and youth of America.

SUMMARY

The Ad Hoc Committee's position on copyright law revision is:

1. Limited Copying and Recording [SECTION 3]
    - (a) §107 ("fair use") without textual changes [p.14 *et seq.*]
    - (b) a legislative history that affords some certainty for teachers [p.19 *et seq.*] and
        - (i) assures permanence of "fair use" [pp.16-17]
        - (ii) rejects description of 4th criterion such that fair use is obviated by possibility of any sale "no matter how minor the amount of money involved" [pp.21-22]
    - (c) rejection of §1(b)(2) of S.2216 [pp.17-19]
    - (d) extension of waiver of statutory damages to broadcast teachers and librarians [p.22]

    If these requirements are not all met, Ad Hoc reverts to its original position:
    - (1) retention of "not-for-profit" provision [p.10]
    - (2) specific statutory authorization for limited educational copying and recording (§111) [p.10]
    - (3) statutory "fair use" [p.13]

2. New Educational Technologies [SECTION 4]
    - (a) Individualized instruction - eliminate §110(2)(D) of S.597 (and identical §110(2)(C) of H.R.2512) which eliminates individualized learning through modern technology [pp.23-25]
    - (b) Educational broadcasting [p.25, *et seq.*]
        - (i) new §110(1A), to differentiate between open and closed circuit transmission of instructional material [pp.26-27]
        - (ii) retain House version of §110(2) and §112(b), relative to copying and recording [pp.27-29]
        - (iii) new section for licensed uses beyond exemption and "fair use" [p.30]
    - (c) Computers [pp.30-35]
        - (i) pending Commission study, input for nonprofit educational use is not an infringement [pp.31-34]
        - (ii) computer programs should not be copyrightable [p.34]
        - (iii) Commission to study technology should be [pp.34-35]
            - --independent agency
            - --composed predominantly of public members

3. Copyright Duration [SECTION 5]

    The copyright term should comprise an initial period of 28 years plus a renewable period of 28 or 48 years. [pp.35-38]

1638

NOTES

Section 1. The Ad Hoc Committee

1. Hearings on S.1006 Before the Subcommittee on Patents, Trademarks and Copyrights, Senate Judiciary Committee, 89th Cong., 1st Sess. (1965) [hereinafter cited as "Senate Hearings (1965)"], "Copyright Law Revision," p.82.

Section 2. What Education Wants from a Copyright Law

1. Wigren, H.E., "An Educator's Viewpoint," SCHOLASTIC TEACHER, Vol. 85, No. 4, Oct. 7, 1964, p.12-T.

2. Wigren, H.E., Hearings on S.597 Before the Subcommittee on Patents, Trademarks and Copyrights, Senate Judiciary Committee, 90th Cong., 1st Sess. 1967, March 16, 1967, p.152. [Hereinafter cited as "Senate Hearings (1967)"].

3. A. Kaminstein, Senate Hearings (1965), p.65

4. Edinger, Dr. Lois V., Hearings on H.R.4347, Before Subcommittee No. 3, House Judiciary Committee, 89th Cong., 1st Sess.,(June 2, 1965), p.385. [Hereinafter called "House Hearings"].

5. Senate Hearings (1965), p.140.

6. CHICAGO TRIBUNE, August 18, 1964, p.24 (editorial).

Section 3. Limited Copying and Recording for Educational Use

1. Senate Hearings (1965), p.172.

2. COPYRIGHT LAW REVISION, Report of the Register of Copyrights, House Committee Print, 87th Cong., 1st Sess. (July 1961), p.27. [Hereinafter cited as "Register's Report (1961)"].

3. Senate Hearings (1965), p.90.

4. House Hearings, p.317.

5. House Report No. 83, 90th Cong., 1st Sess., on H.R. 2512, March 8, 1967. [Hereinafter cited as "House Report"], p.29.

6. Meyerhoff, Howard A., President, Committee to Investigate Copyright Problems Affecting Communication in Science and Education, Senate Hearings (1967), p.115.

7. Senate Report No. 640, 90th Cong., 1st Sess., on S.2216, p.4.

8. House Report, p.32.

9. Goldman, Abe A., Copyright Law Revision and Music Librarians, LIBRARY JOURNAL, March 15, 1965, p.1268.

10. Clapp, Verner W., Copying - A Librarian's View, Association of Research Libraries (August 1968), p.6.

Section 4. Reasonable Use of New Educational Technologies

1. Senate Hearings (1967), p.204.

2. Ibid., p.203.

3. Ibid., p.155.

4. Ibid., p.152.

5. Ibid., p.155.

6. House Report, pp.24-5.

7. Senate Hearings (1967), p.191.

8. Ibid., p.194.

9. Ibid., pp.194-5.

10. Ibid., p.95.

11. Ibid., p.558.

12. Ibid., p.561.

13. For rationale see Professor Miller's statement on behalf of the Ad Hoc Committee, Senate Hearings (1967), pp.198-9.

Section 5. Duration of Copyright

1. COPYRIGHT LAW REVISION, Studies Prepared for the Subcommittee on Patents, Trademarks and Copyright, Senate Committee on Judiciary, 86th Cong., 2d Sess., Committee print, Study 31, "Renewal of Copyright" (by Barbara A. Ringer), pp. 187, 221.
2. Register's Report (1961), p.51.
3. *Ibid*., p.51.
4. Senate Hearings (1965), p.68.
5. Register's Report (1961), p.33.
6. Letter of Deputy Attorney General Katzenbach, May 2, 1962, House Report No. 1742, 87th Cong., 2d Session, on H.J.Res.676, p,6.
7. Senate Hearings (1965), p.130.

Section 6. Basic Principles of Public Policy

1. Letter of Deputy Attorney General Katzenbach, May 2, 1962, House Report No. 1742, 87th Cong., 2d Sess., p.6.
2. Hudon, E.G., *The Copyright Period*: *Weighing Personal Against Public Interest*, 49 AMERICAN BAR ASSOCIATION JOURNAL, 759 (1963)
3. House Report No.2222, 60th Cong., 2d Sess., p.9.
4. Fortnightly Corp. v. United Artists Television, Inc., U.S. , 20 L.Ed. 2d 1176, 1180 (1968)
5. *Op*. *Cit*. *supra* n.3, at page 7.
6. *U.S. v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948).
7. *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932).

EXHIBITS

1. List of Members of the Ad Hoc Committee
2. "Fair Use" -- An Uncertain and Unreliable Guide for Teachers
3. Unsuitability of Copyright Clearing House
4. Proposed New Section on Educational Broadcasting
5. Copyright Duration
6. Copyright and the Constitution

EXHIBIT 1

AD HOC COMMITTEE ON COPYRIGHT LAW REVISION
(Educational Organizations and Institutions)

1. American Association of Colleges for Teacher Education
2. American Association of Junior Colleges
3. American Association of School Administrators
4. American Association of Teachers of Chinese Language and Culture
5. American Association of Teachers of French
6. American Association of Teachers of Spanish and Portuguese
7. American Association of University Women
8. American Council on Education
9. American Educational Theatre Association, Inc.
10. Association for Childhood Education International
11. Association for Higher Education
12. College English Association
13. Council of Chief State School Officers
14. Department of Audiovisual Instruction, NEA
15. Department of Classroom Teachers, NEA
16. Department of Foreign Languages, NEA
17. Department of Rural Education, NEA
18. International Reading Association
19. Midwest Program on Airborne Television Instruction, Inc.
20. Modern Language Association
21. Music Educators National Conference
22. Music Teachers National Association
23. National Art Education Association
24. National Association of Educational Broadcasters
25. National Catholic Educational Association
26. National Catholic Theatre Conference
27. National Catholic Welfare Conference
28. National Commission on Professional Rights and Responsibilities
29. National Council for the Social Studies
30. National Council of Teachers of English
31. National Education Association of the United States
32. National Educational Television and Affiliated Stations
33. National School Boards Association
34. New Jersey Art Education Association
35. Speech Association of America

NOTE: Representatives of the American Library Association regularly attend Ad Hoc Committee meetings although ALA is not formally a member.

EXHIBIT 2

"Fair Use" -- An Uncertain and Unreliable Guide for Teachers

The original, and still prevailing, judgment of the Ad Hoc Committee is that fair use alone is not a reliable and adequate instrument for educators seeking to use copyrighted materials. The Register of Copyrights has said of fair use: "That term eludes precise definition . . . ."[1] Elsewhere he officially informed the public: "The line between 'fair use' and infringement is unclear and not easily defined."[2] The most recent treatise on copyright law states that

> "The scope and limits . . . are most obscure, so that the issue of fair use has been called 'the most troublesome in the whole law of copyrighting.'"[3]

A study for the Copyright Office reached "the conclusion that fair use is not a predictable area of copyright law."[4] The distinguished Executive Director of the Copyright Society of the U.S.A. wrote to the Copyright Office that "the term 'fair use' defies definition."[5] A National Science Foundation-sponsored study of photocopying said of fair use: "It is significant that no two legal opinions were in exact agreement."[6]

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[1] Register of Copyrights, Copyright Law Revision, Report to the Congress on the General Revision of the U.S. Copyright Law, House of Rep., Com. on the Jud., 87th Cong., 1st Sess., House Comm. print, July 1961, p.24.

[2] Copyright Office, "Fair Use" of Copyrighted Works, Circular 20, 913, June 1962.

[3] NIMMER ON COPYRIGHTS, §145 (1963)

[4] Copyright Law Revision, Studies Prepared for the Subcommittee on Patents, Trademarks and Copyrights, Sen. Comm. on Jud., Study 14, "Fair Use of Copyrighted Works" (by Alan Latman), p.14, 86th Cong., 2d Sess., Comm. print.

[5] Ibid., p.39. (Walter J. Derengerg)

[6] Survey of Copyrighted Material Reproduction Practices in Scientific and Technical Fields, by George Fry & Associates (1962), p. V-20.

Fair Use is so uncertain that the Register of Copyrights advises the public that seeks advice as follows:

> "When it is impracticable to obtain permission, use of copyrighted material should be avoided unless it is clear that the doctrine of 'fair use' would apply to the situation. If there is any doubt or question, it is advisable to consult an attorney."[7]

Even expert copyright lawyers disagree on what is and what is not "fair use" in a given set of circumstances. Perhaps the most current example of this is the pending suit by a medical publisher against the U.S. charging that it is not fair use for the National Medical Library of HEW to serve requests for medical journals by sending a photocopy of the article rather than the entire original journal.[8] Apparently the Department of Health, Education and Welfare, the Public Health Service and the U.S. Department of Justice all believe this practice is fair use, but the publisher disagrees.

At one time a distinguished lawyer for publishers virtually insisted that fair use did not include any reprography at all, and even testified that the doctrine of fair use is not generally applicable to advanced technology.[9] This same attorney also testified that: "The doctrine of fair use was never intended to afford certainty of the law."[10]

In response to a question from the chairman of the House hearings as to whether there was a judicial definition of "fair use," the General Counsel of the Copyright Office said that "there is no precise definition. This must be gleaned from reading a number of cases." Another witness in the House hearings said that the solution was a "mutual sort of unspoken understanding." One witness said that "any writer" regards it to be fair use for a teacher to make one or two copies of a work, but two lawyers said that fair use never even allowed one copy of a full work."[11] An author's copyright lawyer even said that copying a work by pencil was an infringement.[12]

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[7] Op. cit., supra, note 2, ¶5.

[8] Williams and Wilkins v. U.S., U.S. Ct. of Claims, No. 73-68 (2/27/68).

[9] Hearings before Subcommittee No. 3 of the House Committee on the Judiciary, 89th Cong., 1st Sess. on H.R.4347, "Copyright Law Revision," pp. 1459.

[10] Ibid, p.1433.

An example of the esoteric basis for fair use is the effort of the Register of Copyrights to give examples in his 1961 Report of what he regarded as clearly fair use.[13] But the very example he used caused disagreement with the American Book Publishers Council as to whether fair use consisted of "a part" or only "a small part" of a work. However, this was only the beginning of the confusion. In the later House hearings, the General Counsel of the Copyright Office testified that only "a relatively small" part is permissible as fair use. And the Register's Supplemental Report (May 1965) says that fair use applies only for "the relative insignificance of the excerpt copied."[14] And, to complicate matters even more, the Music Publishers Association of the United States advised teachers they could not use "any part" of any copyrighted work.

Various Federal agencies have submitted reports or testimony on H.R.4347 which also substantiates the difficulty, if not folly, of attempting to rely on fair use in terms of the predictable right to copyrighted material.

The Federal Communication Commission's report on H.R.4347

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11. Senate Hearings, p.134.

12. House Hearings, p.1773.

13. Cf: Senate Hearings, p.123.

14. COPYRIGHT LAW REVISION, Part 6, Supplementary Report of the Register of Copyrights, House Com. Print, 89th Cong., 1st Sess., May 1965, p.34.

stated in part:

> "However, we are also mindful that 'fair use' is both a limited and an indefinite doctrine . . .. Further, there is no precise way of knowing how much of a copyrighted work can be used in a given situation under the doctrine of fair use. The prospective user would apparently need expert advice to judge each case individually under the provisions set forth in §107, and, even so, there would be the risk of having to defend an infringement suit. . . . we are therefore of the opinion that the doctrine of 'fair use' would not in and of itself, be an adequate answer for educational broadcasting purposes."[15]

The Health, Education and Welfare Department's report on H.R.4347 says, in part:

> "1. With no reported judicial decisions on the subject, it would be useful to libraries, authors, publishers, scientists, and researchers to have the permissible limits of photocopying spelled out in the statute.
>
> "2. The failure of a comprehensive revision of the Copyright Law to include a provision on photocopying might be deemed to indicate an intent by Congress not to authorize photocopying by libraries as a limitation on the exclusive rights of a copyright holder."[16]

If copyright law experts cannot agree, how can the classroom teacher act safely in such matters? Must he have a "hot line" to his lawyer? The difficulty is complicated by the fact that fair use is determined by courts _after_ the fact, when liability for infringement may already have occurred. It has not been an affirmative doctrine, but rather a defense when a user is sued for infringement. And the teacher relying on fair use has the burden of proving that his use was a fair use.

This is not to say that fair use should be abolished or its scope restricted, but only to note the obvious and painful fact

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[15] House Report, p.477.

[16] _Ibid_., p.1133.

1647

that its meaning and applicability to a given use is uncertain, and that it is legally risky for teachers to rely wholly on fair use.

Quite apart from what may be the technical law, how easy will it be to persuade the ordinary classroom teacher or supervisor, or for that matter the normal school board, that fair use is a meaningful doctrine in the face of the kinds of copyright notices they see on materials they want to use reasonably and responsibly. For example, take this one used by a leading publisher:

> "All rights reserved. No part of this book may be reproduced or utilized in any form, or by any means, electronic or mechanical including photocopying, recording, or by any information storage or retrieval system without permission in writing from the Publisher."

In the face of that "notice," it would take a bold teacher to rely on fair use for anything.

The ultimate effect is either that teachers will surreptitiously use the work "under the table," or not use it at all, to the detriment of the students. Fair use is not a sufficient guideline for the classroom teacher to know when copyrighted materials may be used. Fair use is not an adequate substitute for an automatic, but limited, exemption proposed by the Ad Hoc Committee on the theory of the present law's "not-for-profit" protection to education.

EXHIBIT 3

Unsuitability of a Copyright Clearing House

Over a period of years, various suggestions have been made for a clearing house as a purported means of meeting education's needs in the use of copyrighted materials for nonprofit educational purposes.

On September 15, 1964, the Ad Hoc Committee in plenary session met with the publishers who proposed a clearing house of licensing system. The Ad Hoc Committee formally suggested that the publishers submit a firm and specific proposal. This was never done.

On January 7, 1965, the Ad Hoc Committee heard a proposal from Irwin Karp, Esq., attorney for the Authors League of America, Inc.,for a statutory licensing system. Nought came of this.

The Committee to Investigate Copyright Problems Affecting Communication in Science and Education was a major sponsor of a copyright clearing house. It testified before the House Subcommittee in 1965 that it was planning to have "a thorough study" to determine "a feasible method for dealing with the problem of use."[1] No such study was ever made.

At one or another time, various subcommittees of the American Bar Association proposed or dealt with suggestions for a clearing house or licensing system. The matter has been the subject of major disagreement between two different ABA subcommittees. Nothing came of these efforts.

At the "summit conferences" in June 1966, the following methods of collection for compensable uses were discussed, beyond fair use:

(a) compulsory licensing system with government control of rates
(No group favored this plan.)

(b) compulsory licensing and stamp plan
(No group favored this plan.)

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[1] House Hearings, p.1480

(c) voluntary Clearing House plan
(This plan was favored by publishers only.)

(d) free use provided by statute unless copyright owner responds within a specific time period to teacher's request for use (User must notify Library of Congress or copyright owners of intended use; if user does not hear within a given period, he may automatically use material.)

(e) publisher publishes his copying rates on back of title page or in a separate catalog.

Plans (d) and (e) were left open at the "summit conferences" for consideration. The first three plans were set aside because of objections of one or another group. Nothing has ever come of this.

Despite all these circumstances, the Ad Hoc Committee adopted a resolution on January 25, 1967, as follows:

> "The Ad Hoc Committee
>
> (a) reiterates its position of willingness at this time to consider firm proposals for a clearing house, licensing system, or other alternative method of achieving easy access to copyrighted materials;
>
> (b) will not at this time participate in any group developing such system."

The unsuitability of a clearing house to meet education's needs in using copyrighted materials has emerged from these and other discussions on the subject. There are at least four reasons:

(1) There has been no definite and firm plan which the copyright interests themselves would accept, and no disposition to allow user participation in the control of any such plan.

(2) Such system tends--and may even be designed--to erode fair use instead of being a supplement to fair use.

In this connection it is instructive to note the Senate testimony of one of the strongest supporters of a clearing house, the Committee to Investigate Copyright Problems Affecting Communication in Science and Education, that fair use was

> ". . . a temporary safety valve until some clearing house system is established. At that time, the concept of fair use should lose its importance and die off as some sort of vestigial tail."[2]

(3) Schools may face the danger of continuous monitoring of classrooms to ascertain the extent and nature of the use of copyrighted material, as a means of administering the system. Schools might also be subjected to unhealthy pressures to use particular materials in order to boost the provider's allocable portion of the clearing house's receipts.

(4) No system so far discussed or proposed meets the following minimum needs of education:

- (a) mandatory application
- (b) complete coverage of all works in a single system
- (c) protection against unreasonably escalated fees
- (d) ease of administration within schools.

In any event, whatever the merits of a clearing house arrangement, if any, it in no wise meets the requirements for specific and particular statutory rights and authorizations for education within the copyright law itself, as the Ad Hoc Committee has recommended. A clearing house is not a suitable means for meeting education's needs in a copyright law.

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2. Senate Hearings (1967) p.115.

EXHIBIT 4

Proposed New Section on Educational Broadcasting

to be substituted for Sections 110(2) and 112(b)
of H.R.2512 -- S.597

____. Limitations on Exclusive Rights: Educational Transmissions

(a) Certain Educational Transmissions Exempted --

An educational transmission embodying the performance or display of a non-dramatic musical, literary, pictorial, graphic or sculptured work is not an infringement of copyright if:

(1) the content of the transmission is a regular part of the systematic instructional activities of a governmental body or nonprofit educational institution;

(2) the performance or display of the copyrighted work is directly related to the teaching content of the transmission and is of material assistance to the instruction encompassed thereby; and

(3) the transmission is primarily for:

(A) reception in classrooms or similar places normally devoted to instruction, or

(B) reception by students regularly enrolled in nonprofit educational institutions, or

(C) reception by persons other than regularly enrolled students to whom the transmission is directed because their disabilities or other special circumstances prevent their attendance in classrooms or similar places similarly devoted to instruction, or

(D) reception by governmental officials or employees in connection with their official duties or employment.

(b) Certain Educational Transmissions Fully Actionable --

An educational transmission embodying the performance or display of a dramatic or choreographic work, pantomime, motion picture or continuous audio-visual work is actionable as an act of infringement under Section 501 and is fully subject to the remedies provided by Sections 502 through 506.

(c) Limitation of Liability for Certain Educational Transmissions--

With respect to an educational transmission embodying the performance or display of a copyrighted work outside the scope of subsection (a) or (b), liability for infringement under Section 501 does not include the remedies provided in Sections 502, 503, and 506, and the remedies included in Sections 504 and 505 are limited to recovery of a reasonable license fee as found by the court under the circumstances of the case, except as follows:

(1) Where the court finds that the infringer either has failed to make a timely request for a license or has not accepted a timely offer of a license for a reasonable fee, it shall award as statutory damages under Section 504(c) the sum of not less than $100 nor more than three times the amount of a reasonable license fee as the court considers just, to which may be added a discretionary award of costs and attorneys' fees under Section 505;

(2) Where the court finds that the copyright owner either has failed to make a timely reply to a request for a license or has not made a timely offer of a license for a reasonable fee, it may reduce or withhold any award of damages under Section 504 and may, in its discretion, award to the infringer costs and attorneys' fees under Section 505.

(d) Definitions --

As used in this section:

(1) "Educational transmissions" shall mean public broadcasts over noncommercial educational television and radio stations operated by nonprofit educational organizations under license by the Federal Communications Commission or other appropriate agency;

(2) "Educational transmissions" shall not be precluded from the provisions of this Section ____ by virtue of being:

(A) relayed from, forwarded to, converted into or otherwise interconnected with other educational transmissions or re-transmissions by wire, radio or other communication device; or

(B) fixed on film, tape, disc and/or other copying devices for transmission or re-transmission purposes;

and said interconnection and fixation processes shall be deemed integral parts of the educational transmissions subject to subsections (a), (b), and (c) respectively.

16 54

EXHIBIT 5

Copyright Duration

One of the principal reasons advanced for the proposal for a copyright duration of life-plus-50, which is a radical departure from established American copyright renewal and duration practice, is the alleged necessity for conformity with the copyright law in many foreign countries. There are many answers to this enforced conformity of our law to foreign law:

First, the U.S. Constitution sets our copyright law apart from all foreign copyright laws. The Constitution permits copyright only "for limited times." The Copyright Act passed immediately after the adoption of the Constitution regarded 14 years as a limited time for initial terms, and the patent law (which comes under the same Constitutional provision) still has only a 17-year term. Thus, the drive for conformity to foreign laws seems to ignore the fundamental limitation in our Constitution which must prevail regardless of foreign laws.

Second, the best interests of the American people must prevail over any mechanical concept of conformity to foreign law. Such conformity is detrimental to the interests of some 45,000,000 school children of America.

Third, adoption of conformity-to-foreign-law as a principal basis for copyright law revision is a dangerous precedent. For example, most foreign countries have no copyright notice requirement except for special kinds of works.[1] Also, major foreign countries have no system of copyright registration and deposit of copyright material.[2] By adopting the conformity-with-foreign-laws rationale, do we say that henceforth copyright notice and copyright registration and deposit will also be eliminated although notice has been part of our copyright law since 1802 and registration since 1790?

Fourth, the proposed term of life-plus-50 is unnecessary, according to the Register's 1961 Report, even if Congress wants to make our maximum term generally comparable to that given American works in other countries. All that is necessary, the Register said, and Ad Hoc agrees, is to increase the total term from the present 56 years to 76.[3]

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1. Goldman, Abe A., Copyright Law Revision and Music Librarians, LIBRARY JOURNAL, March 15, 1965, p.1268.

2. Register's Report (1961), p.73.

3. Ibid., p.51.

EXHIBIT 6

Copyright and the Constitution

There are those who argue that copyright is a property right and that therefore Congress has no authority to limit such property right. This simply is not so. Article I, §8 of the Constitution grants no rights to authors; it merely grants power to Congress to enact copyright legislation. The Supreme Court so ruled in the very first case in which it considered this problem. In Wheaton v. Peters, 8 Pet. 591, 661 (1834), counsel for complainants insisted that the constitutional provisions did not originate a right but merely protected one already in existence. The Supreme Court specifically rejected this argument:

> "Congress then, by this act, instead of sanctioning an existing right, as contended for, created it. (661) . . . This right, as has been shown, does not exist at common law--it originated, if at all, under the Acts of Congress." (663) [1]

The House Report on the current Copyright Law of 1909 also made this same point crystal clear:

> "The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings, for the Supreme Court has held that such rights as he has are purely statutory rights. . . . The Constitution does not establish copyrights, but provides that Congress shall have the power to grant such rights if it thinks best."[2]

There is a long and uninterrupted line of cases that hold unequivocally that copyright protection is completely and solely a matter of statute,[3] and that copyright is only a privilege or a franchise.[4] Under Supreme Court rulings it is settled law that any copyright right is simply a creature of statute.[5] As distinguished from literary property, copyright is wholly a matter of Congressional discretion to grant or to withhold.[6] This doctrine was reaffirmed by the Supreme Court this year in the CATV case, when it ruled:

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[1] To the same effect, see Mazer v. Stein, 347 U.S. 201, 214 (1954); Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932); Caliga v. Inter Ocean Newspaper Co., 215 U.S.182, 188 (1909).

[2] House Report No.2222, 60th Cong., 2d Sess., p.7.

> "The Copyright Act does not give a copyright holder control over all uses of his copyrighted work.[8] Instead, §1 of the Act enumerates several 'rights' that are made 'exclusive' to the holder of the copyright. If a person, without authorization from the copyright holder, puts a copyrighted work to a use within the scope of one of these 'exclsive rights', he infringes the copyright. If he puts the work to a use not enumerated in §1, he does not infringe."[7]

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3. Miller Music Corp. v. Daniels, Inc., 362 U.S. 373, 375 (1960); Bentley v. Tibbals, 223 F. 247, 248 (C.A.2d 1915); Grant v. Kellogg Co., 58 F.Supp. 48, 52 (S.D. N.Y. 1944), aff'd 154 F.2d 59 (C.A. 2d, 1946).

4. Local Landmarks v. Price, 170 F.2d 715, 718 (C.A. 5th, 1948).

5. American Tobacco Co. v. Werckmeister, 207 U.S. 284, 291 (1907); White-Smith Music Pub. Co. v. Apollo, 147 F.226, 227 (C.A. 2d 1906), aff'd 209 U.S. 1, 15 (1908). See also Loew's Inc. v. C.B.S., 131 F.Supp. 165, 173 (1955), aff'd 239 F.2d 532 (C.A. 9th 1956), aff'd by equally divided court, 356 U.S. 43 (1958)

6. Kraft v. Cohen, 117 F.2d 579, 580 (C.A. 3d, 1941); Keene v. Wheatley, 14 Fed.Cas. 180, 185 #7644 (Cir.Ct.Pa. 1920).

7. Fortnightly Corp. v. United Artists Television, Inc., U.S. , 20 L.Ed.2d 1176, 1180 (June 17, 1968). Footnote 8 of the Court's opinion read, in part, as follows:
   8. "'The fundamendal [is] that "use" is not the same thing as "infringement," that use short of infringement is to be encouraged . . .,' Kaplan, An Unhurried View of Copyright 57 (1967)."

The Supreme Court has also held that the conditions upon which copyright is granted are wholly within the constitutional power of Congress to prescribe.[8] The whole history of the copyright law exemplifies the fact that an author has no constitutional property right in or to copyright protection and that such right as an author obtains is a privilege to be granted or withheld by Congress in its discretion. As the House Report on the present copyright law said of copyright rights granted to authors: ". . . Congress has the power to annex to them such conditions as it deems wise and expedient."[9] The very first copyright law, enacted in 1790, 1 STAT. p.124, c 15, gave protection only to maps, charts and books, and that only for a 14-year period plus renewal of 14 years. It did not cover periodicals, drawings, works of art, musical composition, dramatic composition--to name but a few. And even the present far more extensive law of 1909 is not all-inclusive and places limits on author's copyright privileges. Congress has limited the number of years during which an author may exercise copyright privileges. Congress has limited the uses to which the copyright owner's copyright privileges attach, _i.e._, the "for profit" limitation on public performance rights; compulsory licenses; the non-inclusion of "rental rights," to cite but a few. In addition to Congressional limitations of any so-called "property" rights in copyright, the courts have also developed a further limitation through the doctrine of "fair use."

The Register himself has officially rejected this so-called "property" concept of copyright:

> "Copyright . . . has certain features of property rights, personal rights and monopoly, but it differs from each of these. The legal principles usually applicable to property . . . are not always appropriate for copyright."[10]

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[8] _Wheaton v. Peters_, 8 Pet., 591, 663-4 (1834). See also _Application of Cooper_, 254 F.2d 611, 616 (C.C.P.A. 1958), _cert denied_ 358 U.S. 840 (1958); _Stuff v. La Budde Feed & Grain Co._, 42 F. Supp. 493, 496 (E.D. Wis. 1941); See NIMMER ON COPYRIGHTS (1963), p.14.

[9] _Op_. _cit_., _supra_ n.2, p.9.

[10] Register's Report (1961), p.6.

Thus, it is clear that copyright is a privilege conferred by statute and that the conditions, limitations and exemptions upon which such privilege is conferred are wholly within the constitutional power of the Congress to prescribe. Therefore, the provisions of a copyright act depend not upon property rights, but upon public policy.